

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

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In the Matter of:

DPH HOLDINGS CORPORATION, ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

300 Quarropas Street

White Plains, New York

December 18, 2009

10:17 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 Order signed on 12/14/2009 Shortening Notice with Respect to
2 Retire Committee's Motion to Expand Voluntary Employee Benefit
3 Association Benefits to Hourly Employee Retirees.

4
5 Motion to Approve to Expand Voluntary Employee Benefit
6 Association Benefits to Hourly Employee Retirees filed on
7 behalf of Official Committee of Eligible Salaried Retirees.

8
9 Motion to Extend Time for Service filed on behalf of Official
10 Committee of Eligible Salaried Retirees.

11
12 Reorganized Debtors' Supplemental Reply to Responses of Certain
13 Claimants to Debtors' Objections to (A) Proofs of Claim Nos.
14 13663 and 13730 Filed By The International Union Of Operating
15 Engineers, Local 101-S

16
17 Notice of Sufficiency Hearing With Respect to Debtors'
18 Objection to Proofs of Claim Nos. 1374, 1375, 1376, 1377, 1378,
19 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 2539,
20 3175, 5408, 6468, 6668, 7269, 9396, 10570.

21
22 Response Reorganized Debtors' Supplemental Reply to Response of
23 Jane M. Duffy to Debtors' Objections to Proof of Claim No. 3175
24 Filed By Jane M. Duffy

25

1 Response Reorganized Debtors' Supplemental Reply To Responses
2 Of Certain Claimants To Debtors' Objections To (A) Proof Of
3 Claim Nos. 10570 And 10571 Filed By TK Holdings Inc.,
4 Automotive Systems, Inc., And Takata Seat Belts, Inc.

5
6 Response Reorganized Debtors' Supplemental Reply To Responses
7 Of Certain Claimants To Debtors' Objections To (A) Proof Of
8 Claim No. 6468 Filed By Barbara Burger, (B) Proof Of Claim No.
9 13464 Filed By Paul Pickles

10
11 Response Reorganized Debtors' Supplemental Reply To Responses
12 Of Certain Claimants To Debtors' Objections To Proofs Of Claim
13 Nos. 15513, 15515, 15519, 15520, 15521, 15524, And 15532 Filed
14 By Johnson Controls, Inc. And Affiliates

15
16 Response Reorganized Debtors' Supplemental Reply to Responses
17 of Sharyl Y. Carter to Debtors' Objections to Proofs of Claim
18 Nos. 16849 and 16850 Filed By Sharyl Y. Carter

19
20 Response Reorganized Debtors' Supplemental Reply To Responses
21 Of Certain Claimants To Debtors' Objections To (A) Proofs Of
22 Claim Nos. 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381,
23 1382, 1383, 1384, 1385, 1386, And 1387 Filed By American
24 Insurance Group

25

1 Objection Reorganized Debtors' Objection to Motion of Michigan
2 Self-Insurers' Security Fund To Permit Late Filed Claim
3 Pursuant To Fed. R. Bank. P. 9006(b)

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5 Notice of Hearing

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25 Transcribed by: Dena Page

A P P E A R A N C E S :

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

Attorneys for DPH Holdings

155 N. Wacker Drive

Chicago, IL 60606

BY: JOHN K. LYONS, ESQ.

JOSEPH N. WHARTON, ESQ.

ALBERT L. HOGAN, III, ESQ. (TELEPHONICALLY)

STATE OF MICHIGAN, ATTORNEY GENERAL'S OFFICE,

LABOR DIVISION, WORKERS' COMPENSATION UNIT

Attorneys for Michigan Self-Insurers' Security Fund

525 West Ottawa Street

5th Floor

Lansing, MI 48909

BY: DENNIS J. RATERINK, AAG, ESQ.

1
2 ALSTON + BIRD LLP

3 Attorneys for ACE American Insurance Company

4 90 Park Avenue

5 New York, NY 10016

6
7 BY: MARTIN G. BUNIN, ESQ.

8
9
10 DUANE MORRIS LLP

11 Attorneys for ACE Insurance Group and Pacific Employers'

12 Insurance

13 30 South 17th Street

14 Philadelphia, PA 19103

15
16 BY: LEWIS R. OLSHIN, ESQ.

17 MARGERY N. REED, ESQ. (TELEPHONICALLY)

1
2 FARELLA BRAUN & MARTEL LLP

3 Attorneys for Official 1114 Committee of Eligible

4 Salaried Retirees

5 235 Montgomery Street

6 17th Floor

7 San Francisco, CA 94104

8
9 BY: DEAN M. GLOSTER, ESQ. (TELEPHONICALLY)

10
11
12 GORLICK, KRAVITZ & LISTHAUS, P.C.

13 Attorneys for International Union of Operating Engineers

14 Locals

15 17 State Street

16 4th Floor

17 New York, NY 10004

18
19 BY: BARBARA S. MEHLSACK, ESQ. (TELEPHONICALLY)

PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C.

Attorneys for IBEW and IAM

1555 N. Rivercenter Drive

Suite 202

Milwaukee, WI 53212

BY: MARIANNE GOLDSTEIN ROBBINS, ESQ. (TELEPHONICALLY)

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P R O C E E D I N G S

THE COURT: Okay, everyone else is here on DPH Holdings, Delphi? Yes? Okay, so we can take that.

MR. GLOSTER: Good morning, Your Honor. This is Dean Gloster, Farella Braun & Martel, representing the official 1114 committee of eligible salaried retirees.

THE COURT: Okay. All right, shall we deal with that one first before we deal with all the claim issues?

MR. LYONS: Sure. This is John Lyons on behalf of DPH Holdings. Your Honor, I have my colleague, Al Hogan, on the line who will deal with that matter.

THE COURT: Okay. Good morning, Mr. Hogan.

MR. HOGAN: Good morning, Judge, how are you?

THE COURT: Good, thanks. So this is the first matter I'm going to take in this case is the unofficial (sic) salaried retiree committees request, which I scheduled by order to show cause. Is there any opposition to it?

MR. HOGAN: No, Judge, there's not. I've had several discussions with Mr. Gloster, and I'm not sure if the proposed order that the DSI is going to seek has been submitted to Your Honor, but there are a couple of provisions of that order that are important to the debtors. One is that there are two previous orders with respect to this matter, and there is a paragraph making clear that the VEBA established by the retirees' committee is sufficient to satisfy the debtors'

1 obligations under the prior orders, with respect to the VEBA.
2 And the second is that nothing in this order will place new or
3 additional obligations on the debtor or any successor purchaser
4 of assets. And so with that, the debtors have no objection and
5 are pleased that the DSRA continues to seek creative ways to
6 help out the debtors' former employees.

7 THE COURT: Okay. Well, certainly, the motion itself
8 was consistent with those two points.

9 MR. GLOSTER: Yes, and we ran a form of order by the
10 attorney for the debtor to make sure that we had that language
11 in there that would satisfy them.

12 THE COURT: Okay, and is that -- I just want to make
13 sure -- has that form been submitted to chambers yet?

14 MR. GLOSTER: No, Your Honor, because we wanted to run
15 it by the debtors' lawyer first --

16 THE COURT: Okay.

17 MR. GLOSTER: -- and get any comments --

18 THE COURT: All right.

19 MR. GLOSTER: -- from them.

20 THE COURT: Okay. Otherwise, it's consistent with the
21 relief that you had previously sought?

22 MR. GLOSTER: Yes, Your Honor.

23 THE COURT: Right.

24 MR. GLOSTER: We simply added the paragraph that it
25 does create no additional obligation from the debtor --

1 THE COURT: Okay.

2 MR. GLOSTER: -- or any successor.

3 THE COURT: All right, well, when I received this, it
4 seemed to me that it was appropriate to put on on short notice
5 since it was really a matter that, economically, the debtor and
6 its acquirer would be neutral over. And I didn't see anything
7 in what was being proposed that would step on any other party
8 in interest's toes or position. So having heard from no
9 opponent to the relief, and based on my review of the motion,
10 I'll grant the relief requested.

11 MR. GLOSTER: Thank you, Your Honor. We'll make sure
12 that the debtor is happy with the form of order, then submit it
13 to the Court.

14 THE COURT: Okay, and I know the timing is important,
15 so my hope is that you could submit it either today or Monday
16 so that you can get notice out to the people so they can make
17 their elections before year end.

18 MR. GLOSTER: Thank you, Your Honor.

19 THE COURT: Okay, thank you.

20 MR. GLOSTER: And now --

21 THE COURT: You can sign off, that's fine.

22 MR. GLOSTER: Thank you, Your Honor.

23 MR. HOGAN: Thank you, Judge.

24 THE COURT: Thank you.

25 MR. HOGAN: Okay.

1 THE COURT: Okay. So now we'll move on to the claims
2 sufficiencies?

3 MR. LYONS: Yes, Your Honor. Before we do that, I'd
4 like to actually bring up, if we could, the sufficiency hearing
5 relating to what I'll call the splinter unions' claims.

6 THE COURT: Okay.

7 MR. LYONS: We have counsel on the phone, and we
8 understand that Your Honor wanted to have a status conference
9 today.

10 THE COURT: Well, it just wasn't clear to me where
11 this matter stood at this point. There were really two aspects
12 to the objection. There was the waiver aspect or the
13 settlement aspect, and then there was the accrued pension
14 liability aspect. It just wasn't clear to me from papers --
15 particularly given that the unions' objection or filings in
16 support of their claims were filed back before the acquisition
17 became effective -- where we stood as far as the remaining
18 issues.

19 MR. LYONS: Your Honor, last night, we filed a reply
20 brief which we think may illuminate the issues and address Your
21 Honor's questions.

22 THE COURT: Okay.

23 MR. LYONS: And we have no objection, certainly, to
24 the splinter unions' ability to file a surreply.

25 THE COURT: Okay.

1 MR. LYONS: And then what I would propose, Your Honor,
2 is you could rule on the papers, or if you'd like to have oral
3 argument, you can let us know --

4 THE COURT: All right.

5 MR. LYONS: -- and we'd be happy to appear.

6 THE COURT: Well, I mean, let me tell you what I think
7 the state of play is, and then you can correct me. By the way,
8 are -- counsel for the unions, are you able to hear me?

9 MS. ROBBINS: Yes, Your Honor. This is Marianne
10 Robbins, IBEW and IAM.

11 THE COURT: Okay. Is Ms. Mehlsack on, also?

12 MS. ROBBINS: She was earlier, Your Honor.

13 THE COURT: Okay.

14 MS. ROBBINS: You can't --

15 MS. MEHLSACK: Your Honor?

16 THE COURT: Oh, there you are.

17 MS. MEHLSACK: Yes.

18 THE COURT: Good morning, Ms. Mehlsack.

19 MS. MEHLSACK: Okay, good morning, Your Honor.

20 THE COURT: As I understood it, the only issues
21 remaining are the pension issues, is that right? That the
22 other matters have been settled, because of the --

23 MS. MEHLSACK: Your Honor, as far as grievances are
24 concerned, I am just -- I am actually trying to get
25 confirmation from -- and those would be, it's my understanding,

1 that the effect of all the orders is to say those are to be
2 resolved in the ordinary course of business. And I am just --
3 I have been trying to get confirmation from my clients that
4 that either is in the course of happening or already has
5 happened. I'm having a bit of difficulty with that, but that's
6 just a logistical problem. I don't think it's a legal issue.
7 And I hope to be able to do that in the next few days.

8 THE COURT: Okay, but it's not really a claim
9 objection issue, right? It would be dealt with in terms of the
10 settlements?

11 MS. MEHLSACK: That's -- I believe that that's
12 correct, Your Honor --

13 THE COURT: Okay.

14 MS. MEHLSACK: -- for the Operating Engineers' Locals.

15 THE COURT: And is that your understanding, also, Ms.
16 Robbins, for your client?

17 MS. ROBBINS: Yes, Your Honor. What we were looking
18 for was confirmation that the debtors were still willing to
19 address the grievances we listed in our proof of claim that
20 have not been resolved, that they would be continuing to be
21 willing to resolve them in the ordinary course. A plant --

22 THE COURT: But when you say the debtors --

23 MS. ROBBINS: -- has closed, and I just wanted to
24 obtain confirmation on that.

25 THE COURT: Okay, but when you say the debtors,

1 because the debtors are, you know --

2 MS. ROBBINS: DPH.

3 THE COURT: DPH? Or the -- because DPH is just a -- I
4 thought, well, my impression was that there was another entity,
5 now, that would be dealing with those claims, an ongoing
6 entity.

7 MS. ROBBINS: Your Honor, my understanding of the plan
8 of reorganization is that closed plants -- and our plant in Oak
9 Creek, Wisconsin, is a closed plant -- remained with DPH.

10 THE COURT: Oh, okay. You're right. I didn't
11 recognize that distinction. I think you're right. Do you have
12 anything to say on that?

13 MS. ROBBINS: And that was one reason for us wanting
14 to clarify --

15 THE COURT: Right.

16 MS. ROBBINS: -- the circumstance, because there is no
17 one here in Oak Creek. It's a matter of finding someone to
18 address them.

19 THE COURT: Okay.

20 MR. LYONS: And Your Honor, if I may propose, the DPH
21 believes that all the employees have signed releases pursuant
22 to various attrition plans. And what I suggest we do is we'll
23 work offline with counsel --

24 THE COURT: Okay.

25 MR. LYONS: -- to see which grievances they believe

1 are still outstanding, and we'll see if a release has already
2 been signed of that grievance, or if it's been resolved.

3 THE COURT: And if they haven't been signed and it's
4 not a plant that's been taken over, then I guess I should deal
5 with it in the claims process.

6 MR. LYONS: And then we'll deal with it in the claims
7 process.

8 THE COURT: All right.

9 MR. LYONS: There may be other release. But again, I
10 think, before you get to the hearing on the claims objection,
11 we will reach out to counsel --

12 THE COURT: Okay.

13 MR. LYONS: -- and try to confirm what grievances.

14 MS. ROBBINS: And that's exactly why we raised that,
15 Your Honor.

16 THE COURT: Okay.

17 MS. ROBBINS: And that's fine.

18 THE COURT: All right, so it seems to me we should
19 bifurcate -- it still seems to me we should bifurcate the
20 issues that were raised by the claim objection. That set of
21 issues that we've just been talking about, it seems to me that
22 the debtor, well -- let me stop saying the debtor -- DPH
23 Holdings and the two unions should meet and confer, find out
24 what the releases are, confirm that for the plants that were
25 taken over, it's now someone else's issue in the ordinary

1 course. For the plants that were shut down or not taken over,
2 DPH will be dealing with it. And to the extent that the claims
3 weren't specifically released by the employees, then it'll be
4 on a separate track. It'll be dealt with at another hearing,
5 that set of claims. So then we have the accrued -- and I think
6 it's limited to the accrued pension liabilities, right?

7 MR. LYONS: Well, Your Honor --

8 MS. ROBBINS: That's --

9 MR. LYONS: -- I don't want to speak for counsel --
10 they may want to articulate their theory -- but I believe they
11 also have a breach of fiduciary duty claim in there, as well,
12 as opposed to just -- in addition to the lost pension claim
13 that they have. Now, we obviously have our views as to whether
14 that claim survives or whether --

15 THE COURT: Well, the issue is whether that's been
16 settled or not, I guess.

17 MR. LYONS: Settled, and also in connection with the
18 PBGC settlement, Your Honor. We believe a lot of these
19 arguments were raised, and Your Honor ruled on that.

20 THE COURT: All right, well that -- I have to say that
21 that didn't -- I think we do need additional briefing on those
22 issues, because what, to me, came through as live issues -- as
23 a live issue, was simply to what extent the unions' pension-
24 related claims survived. And I do need some clarification on
25 what the union is still asserting, and what, alternatively, now

1 that the plan has gone effective and the MOUs are effective,
2 has been covered by the MOU. I understand that the
3 committee -- I'm sorry, that the two unions take the view that
4 the MOU did not specifically settle certain aspects of the
5 pension-related claim. But since the objections were made at a
6 time when the MOUs and the plan had not gone final, I think
7 that the unions also preserved other objections. So Ms.
8 Robbins and Ms. Mehlsack, at this point, what pension related
9 claims are still being asserted by the unions?

10 MS. MEHLSACK: Wait, Your Honor -- go on, Marianne,
11 then I'll --

12 MS. ROBBINS: Your Honor, the MOUs provided extensive
13 pension benefits that were not covered by the release. Now, we
14 understand that the Court's order is that the PBGC would, in
15 fact, be able to terminate the plan. But we do not believe
16 that those claims that relate to our agreement with Delphi,
17 which in our case, now, go to DPH, are, therefore, released.

18 THE COURT: Okay, so --

19 MS. ROBBINS: We also have raised fiduciary claims.

20 THE COURT: -- let -- I'm sorry, let me interrupt you,
21 just for a second. So issue number one, then, for the parties
22 to address is what was not released under the MOUs.

23 MS. ROBBINS: I think, Your Honor, that's right.

24 THE COURT: That's issue number one. Okay?

25 MS. ROBBINS: That's right, Your Honor.

1 THE COURT: Okay. So, then, issue number two is, I
2 guess, what, as a legal matter, may be precluding the unions
3 from asserting those claims. Is that issue number two, and
4 that's the issue of the termination of the plans and the
5 settlement with the PBGC?

6 MS. MEHLSACK: Well, Your Honor, one way of looking at
7 it is that -- and this is Barbara Mehlsack, Your Honor, for the
8 Operating Engineers -- is -- from the debtors' perspective, is
9 that the termination and the takeover by the PBGC, their view
10 is that that precludes the unions from asserting claims.

11 THE COURT: Right.

12 MS. MEHLSACK: It is our view that there are two kinds
13 of claims. One is brief of fiduciary duties, claims, and the
14 debtor has raised standing issues, and there are standing
15 issues that need, I believe, to be briefed.

16 And then there's a question, Your Honor, of the
17 unions' right to claim that, as a result of events, the
18 termination combined with -- conduct by the debtor in
19 connection with the termination combined with the promises that
20 were made in those MOUs, that there have been breaches of the
21 debtors' obligations under ERISA that the unions remain with
22 the authority to claim against the debtors. And I wish I could
23 make it simpler than I have, but I don't think it is simple,
24 Your Honor. I think it arises from a combination of both
25 statutory issues, contractual issues, and conduct both pre-plan

1 termination and in the course of the termination. So those are
2 all the issues that I think probably would benefit from
3 additional briefing.

4 THE COURT: Do you agree with that, Ms. Robbins?

5 MS. ROBBINS: Your Honor, I think that I would
6 probably state it as, one is the question of what was and was
7 not released, as the Court indicated. Then DPH is saying then
8 there is the question of what is precluded by events that have
9 transpired, I would say, a little more broadly. And then there
10 is the status of a breach of fiduciary claim and the issues
11 related to that as they would -- in some cases, that overlaps
12 with one and two, but I think it's a distinct issue.

13 THE COURT: Okay. Mr. Lyons, do you have anything to
14 add to that?

15 MR. LYONS: Well, yes and no, Your Honor. I would
16 say, I mean, obviously --

17 THE COURT: I mean, not on the merits. I know the
18 debtors disagree, but --

19 MR. LYONS: Exactly. I'm not arguing the motion right
20 now.

21 THE COURT: Right.

22 MR. LYONS: And I understand that.

23 THE COURT: Right.

24 MR. LYONS: Your Honor, also, I think we add to that
25 mix the effect of Your Honor's order approving the PBGC

1 settlement. I mean, obviously, it's the debtors' view that
2 once the plan has been terminated, the PBGC, in essence, owns
3 all these claims. And that claim was settled, pursuant to that
4 settlement agreement.

5 THE COURT: Okay. Well, so this is what I would
6 propose. And I do -- I appreciate the debtors did file a
7 supplemental pleading that added additional, or filled out
8 their arguments. But I think that I would like the briefing to
9 go in this order. I would like the debtors to file the first
10 brief, and it would be a short one, except where it would
11 address new points that were not addressed in the supplemental
12 response.

13 MR. LYONS: Okay.

14 THE COURT: And then certainly can be longer. I see
15 the issues as three-fold. First, what was released under the
16 MOUs and what survives under the MOUs. Just a contract
17 interpretation issue. I'm not sure the debtors really -- I'm
18 not sure DPH really dealt with that in its supplement. So, you
19 know, I wouldn't be upset if you added more on that.

20 The second issue, also, I don't think was dealt with
21 it in the supplement, which is the issue of claim or issue
22 preclusion, in light of either the approval of the PBGC
23 settlement, or perhaps other orders I've entered, including the
24 confirmation order. That's different than the MOU issue
25 because it deals with the effect of other orders that I've

1 entered as opposed to agreements between the parties.

2 And then third, and the debtors have briefed this to
3 some extent, as has the union, but I think it should be -- it
4 can be fleshed out more, given the discussion we've just had --
5 is a legal, well, actually, probably two legal issues tying
6 into the proper interpretation of ERISA and the unions' ability
7 both as a standing matter and as a substantive legal matter --
8 that's why I think they're two issues, one is standing and one
9 is substance -- to assert the two types of claims, the breach
10 of fiduciary claim and the pension-related claim, which I agree
11 is somewhat hard to articulate, and I'm not going to suggest
12 that the debtors try to speculate what that claim is, which is
13 why I'm going to give them a chance to file a reply.

14 But in the first instance, I would like the debtors to
15 deal with, in particular, the standing issue for breach of
16 fiduciary duty claim, and then I'm not going to expect them to
17 anticipate the unions' articulation of what the other claim is.
18 Ms. Mehlsack, I think, correctly stated it. It's somewhat hard
19 to articulate, but I gather it's based on conduct of the
20 debtors leading up to the deal with the PBGC, in some way,
21 shape, or form, and I'm not sure that's different from,
22 ultimately, a breach of fiduciary duty claim or not. But I
23 think, probably, in laying out their view of the law on ERISA
24 and preemption and standing, they can, maybe, touch on that
25 point.

1 But then I would look for a responsive brief by the
2 unions on those three points. And frankly, I would look to
3 them to clearly articulate what the claim is, other than the
4 breach of fiduciary duty claim. And then the debtors would
5 have a chance to reply. And my belief is that most of the
6 reply would be taken up in dealing with that second type of
7 pension-related claim. And the rest of the reply would only be
8 if -- to cover things that were just -- whether the DPH felt
9 that the unions were raising a new issue or that they'd really
10 gone off the deep end.

11 But hopefully, that will lay out all the issues. I
12 may -- based on the papers at that point, I may call you up and
13 ask you to have an oral argument on it.

14 I don't know how long this will take you all to do.
15 When do you think the debtors would be prepared to -- or, DPH
16 would be prepared to file the first brief?

17 MR. LYONS: Well, yes, and what I suggest Your Honor
18 is we'll look at the next omnibus hearing and kind of adjust
19 the briefing schedule. I believe our next omnibus hearing is
20 January 21st.

21 THE COURT: Okay.

22 MR. LYONS: And maybe I'm wrong.

23 MS. MEHLSACK: I'm sorry; I didn't hear you, John.

24 MR. LYONS: What I suggest is that we set our briefing
25 schedule based upon the January 21st hearing. If Your Honor

1 would like oral argument, then at least we'll be ready to go on
2 the January 21st. So backing up from --

3 THE COURT: All right, it seems a little tight, to me,
4 but --

5 MS. ROBBINS: Your Honor, yeah, that would be too
6 tight for me. I have several other litigations.

7 THE COURT: Maybe we should look to the next omnibus
8 hearing after that.

9 MR. LYONS: All right, well, why don't I reach out to
10 counsel, Your Honor?

11 THE COURT: Okay.

12 MR. LYONS: And I'm sure we'll be able to work it out.

13 THE COURT: All right.

14 MS. ROBBINS: Yeah. And I guess -- this is Marianne
15 Robbins -- I guess my concern would be that tying the briefing
16 schedule to the omnibus hearing means that we have a very, very
17 short time to do what I think the Court is indicating has to be
18 a real legal doc -- I mean, a document that really has some
19 content.

20 THE COURT: Well, that's why -- I think that I would
21 tie it to not the next one, but the one after that.

22 MS. ROBBINS: I guess --

23 THE COURT: Which I think is in Febru --

24 MS. ROBBINS: Excuse me, Your Honor, what I'm
25 suggesting is --

1 THE COURT: -- some time in February.

2 MS. ROBBINS: -- that there'd be adequate time between
3 the debtors' brief and our responsive brief.

4 THE COURT: Oh, abs -- no, clearly, clearly there
5 would have to be --

6 MS. ROBBINS: And that it not follow the normal --

7 THE COURT: No, no, it's not --

8 MS. ROBBINS: -- schedule where ours comes right on
9 top of the hearing.

10 THE COURT: No, definitely not. The one that would
11 come a few days before the hearing would be the reply. So
12 you'd have to leave each side -- I mean, obviously, you're
13 thinking about these issues in the meantime and researching it,
14 but as far as writing the brief --

15 MS. ROBBINS: Um-hum.

16 THE COURT: -- you're going to need, I'd say, three
17 weeks.

18 MS. ROBBINS: I think that --

19 THE COURT: -- from the debtors --

20 MS. ROBBINS: Thank you, Your Honor.

21 THE COURT: -- from the debtors providing their brief.
22 And I'm happy to give them three weeks for their first brief,
23 too, you know.

24 MS. ROBBINS: Your Honor, in that line, I think we
25 will confer with debtors' counsel and work out a schedule.

1 THE COURT: Okay.

2 MR. LYONS: That works for us.

3 THE COURT: Okay. All right. So is there anything
4 more on the two union claim issues, then?

5 MR. LYONS: No, Your Honor.

6 MS. ROBBINS: No, Your Honor.

7 MS. MEHLSACK: No, Your Honor.

8 THE COURT: So, you two don't need to stay on, unless
9 you want to.

10 MS. MEHLSACK: No, thank you, Your Honor.

11 MS. ROBBINS: Thank you, Your Honor. Thank you for
12 excusing us. Thank you, Your Honor, and happy New Year.

13 THE COURT: Okay.

14 MS. MEHLSACK: Yes, happy holidays. Bye.

15 THE COURT: Same to you. Okay.

16 MR. LYONS: Okay, shall I proceed with the rest of the
17 agenda?

18 THE COURT: Yes.

19 MR. LYONS: Your Honor, the first two items are being
20 adjourned, so I will not spend much time. There are a number
21 of sufficiency matters in item number 2 that we've adjourned
22 indefinitely, and we'll notice those up for hearing once
23 we've -- at the appropriate time.

24 THE COURT: Okay.

25 MR. LYONS: Item number -- the next item matter,

1 number 13 (sic) through 14, are uncontested, agreed, or settled
2 matters. Pursuant to the claims procedures, Your Honor, we did
3 notice out a number of claims for sufficiency hearing, and we
4 only received, well, certainly, we received the splinter
5 unions' response. We received the response of Ms. Sharyl
6 Carter. And then, we've also worked informally with Takata,
7 Takata Corporation and Takata Seatbelts and Highland
8 Industries, which are matters number 3 through 6. So we have a
9 number of what we believe are uncontested matters. They did
10 not file a responsive brief, and I can briefly go through the
11 claims that are subject to these sufficiency matters. So Your
12 Honor --

13 THE COURT: All right, why don't you go through them
14 by name?

15 MR. LYONS: Okay, very good. Okay, well, first of
16 all, Your Honor, the Takata Holdings, Takata Corporation,
17 Takata Seatbelts and Highland Industries, this is, in essence,
18 a protective claim in the event that we were to reject those
19 contracts. Because we have not, they do not have a claim. So
20 we worked out a consensual form of order which we'll submit to
21 Your Honor.

22 THE COURT: Okay.

23 MR. LYONS: So that one is not contested.

24 THE COURT: That's fine. I'll enter that when you
25 submit it.

1 MR. LYONS: Okay, next, Your Honor, matter number 7,
2 which is the claim filed by Jane M. Duffy, Your Honor, that is
3 a claim relating to equity. You know, again, we believe this
4 is a very straightforward matter. Equity claims are, of
5 course, not claims, as defined under the Code, and therefore,
6 we would seek an order expunging her purported claim which is
7 filed based upon an equity interest.

8 THE COURT: Right, well, that's, I mean, when -- I
9 agree with that. The original basis for the objection was
10 insufficient documentation, but it's clear from the
11 documentation that was provided that the claim is based on an
12 equity interest, and therefore, wouldn't be getting a
13 distribution in the case. So I'll grant that objection.

14 MR. LYONS: Thank you, Your Honor. Items number 8
15 through 11 which, by name, were filed by Barbara Burger, Paul
16 Pickles, Hubert Noel Morgan (ph.), and Patricia Wineman (ph.),
17 Your Honor, these all related to salaried OPEB claims, as well
18 as pension claims. As Your Honor has ruled, previously, the
19 salaried OPEB plan was terminable at will and was, in fact,
20 terminated. And therefore, no claim arises from the
21 termination of the salaried OPEB plans. And also, the
22 pensions, Your Honor, were also terminated, and again, the
23 PBGC, as the insurer for the pensions under applicable ERISA
24 law, now, in essence, owns those claims. So we've sought to
25 have those claims listed on agenda items 8 through 11 expunged.

1 THE COURT: Okay. I've reviewed the responses that
2 were filed by these individual claimants, as well as the
3 debtors' supplement in response and support of the objection.
4 And I don't see anyone here representing the claimants, or on
5 the phone, the list of parties on the phone. Is there anyone
6 here on behalf of those claimants? Okay.

7 Based on my review of the claimants' responses, as
8 well as their claims, first, they appear to be relying upon the
9 OPEB benefits that I have previously determined, by a final
10 order, are terminable at will, and therefore, their claims
11 which are not for liquidated benefit claims but for breach
12 claims, are not supportable, given that the benefits were
13 terminatable at will.

14 As far as the pension claims are concerned, again,
15 these claims are by individual beneficiaries of the Delphi
16 pension plans which were the subject of the settlement with the
17 PBGC, including the PBGC's claim in relation thereto. I don't
18 believe that any of these claims assert claims other than
19 claims for benefits, pension benefits under those plans. And
20 consequently, under the case law that the debtors have cited
21 and the commentary, including in Collyer, I think the debtors
22 have sustained their burden in this sufficiency hearing context
23 of showing that the claimants don't have a right to assert a
24 claim in addition to, or to supplement, their benefits that
25 they would be getting, now, through the PBGC.

1 So I will enter an order granting the debtors' claim
2 objections to the claims filed by Barbara Burger, Paul Pickles,
3 Patricia Wineman, and Hubert Noel Morgan.

4 MR. LYONS: Thank you, Your Honor. Item number 12 on
5 the agenda relates to proofs of claim filed by Johnson
6 Controls, Inc. and affiliates. One of those claims, we've
7 actually adjourned because it relates to a claim for set-off,
8 which we couldn't reconcile at this point. But all of the
9 others are, in essence, protective claims, potential breach of
10 contract --

11 THE COURT: Okay.

12 MR. LYONS: -- claims.

13 THE COURT: Was this -- this contract wasn't rejected?

14 MR. LYONS: This contract --

15 THE COURT: Or these contracts; I guess it's more than
16 one.

17 MR. LYONS: You know, I believe, Your Honor, that they
18 may not have been executory. They may well have -- I believe
19 it was just an asset sale.

20 THE COURT: Have they expired?

21 MR. LYONS: Yeah, exactly.

22 THE COURT: Okay.

23 MR. LYONS: These were asset sale agreements, asset
24 purchase agreements. So these were prospective claims that,
25 if -- in essence, indemnities, I believe.

1 THE COURT: Oh, okay.

2 MR. LYONS: That if there were --

3 THE COURT: Well, then they would -- and there've been
4 no liquidated -- there was no response saying that they're now
5 liquidated amounts in respect to the indemnities, so they would
6 be disallowable under 502(e).

7 MR. LYONS: Correct. That was our alternative basis,
8 yes.

9 THE COURT: Okay.

10 MR. LYONS: And again, just a back up for all these,
11 Your Honor, we served out the notice of sufficiency hearings,
12 they got our briefs. I mean, these all clearly identified the
13 claims --

14 THE COURT: Right.

15 MR. LYONS: -- and claim numbers.

16 THE COURT: Right.

17 MR. LYONS: So they did have notice.

18 THE COURT: Okay. Well, again, there's nothing in the
19 record to suggest that the contracts have either been rejected
20 or are not -- or are still -- or that there's any liquidated
21 amount owing under them. So given that, and given the lack of
22 objection, I'll grant the objection with the one exception on
23 the set-off claim.

24 MR. LYONS: Thank you, Your Honor. Item number 13 is
25 the claim of AIG. AIG provided certain insurance to the

1 debtors. Again, this was also an, in essence, a protective
2 claim in case there were some claims that would be subject to
3 reimbursement. Your Honor, as far as the debtors are
4 concerned, there have been no claims that triggered any kind of
5 claims against the debtors. And also, these policies were
6 never rejected, so there are no rejection damages, either.

7 THE COURT: Right.

8 MR. LYONS: We did serve it, and there has been no
9 response.

10 THE COURT: Okay, so I'll grant this objection. I
11 guess it should reflect that it doesn't modify any affirmative
12 rights that AIG has under the stipulation that you have with
13 them.

14 MR. LYONS: The estimation stipulation?

15 THE COURT: Yeah. But that -- I guess there was
16 nothing else remaining under that.

17 MR. LYONS: No, it was estimated at zero.

18 THE COURT: But all I remember is there was a
19 stipulation with them, but it doesn't provide for any ongoing
20 relationship, or does it?

21 MR. LYONS: No, it --

22 THE COURT: Or does it deal with any ongoing
23 relationship?

24 MR. LYONS: Your Honor, I guess we'd have to check the
25 estimation stipulation.

1 THE COURT: Well, just take a look at it.

2 MR. LYONS: We will.

3 THE COURT: I think that as far as the claims are
4 concerned, clearly the debtors have set forth the basis for
5 their disallowance, and there's been no response on that basis.
6 So I'll grant their disallowance. I just didn't want there to
7 be an implication that something in that order disallowing
8 their claim changed any other rights that you -- either DPH had
9 in respect to the insurance or AIG had in respect to the
10 insurance.

11 MR. LYONS: We will make sure that's the case, Your
12 Honor.

13 THE COURT: Okay. And then the same with RLI.

14 MR. LYONS: Very good. And the same, again, the same
15 thing with RLI, you know, no claims have been -- this is, in
16 essence, our customs bonding company.

17 THE COURT: Right.

18 MR. LYONS: And there were no claims against it since
19 the companies had paid customs duties in the ordinary course.

20 THE COURT: Right. So I'll grant that objection on
21 the same basis. There's no stipulation there, so that's easy.

22 MR. LYONS: Okay, Your Honor. Finally, we come to our
23 contested matters, which --

24 THE COURT: Well, I'm sorry, have we dealt with Sharyl
25 Carter?

1 MR. LYONS: That was one of the contested matters.

2 THE COURT: Oh, okay.

3 MR. LYONS: Shall we deal with that now and then turn
4 to the Michigan --

5 THE COURT: Sure.

6 MR. LYONS: Okay, I'd like to turn the podium over to
7 my colleague, Joe Wharton.

8 THE COURT: Okay.

9 MR. WHARTON: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. WHARTON: Joseph Wharton of Skadden Arps on behalf
12 of DPH Holdings. Before us, we have claims numbers 16849 and
13 16850 filed by Sharyl Carter, a former employee of the debtors.
14 We had objected to those on the thirty-fourth omnibus
15 objection. Both of these claims are duplicates of each other,
16 each one asserting 50 million dollars plus interest arising
17 from employment litigation between Ms. Carter and the debtors.

18 THE COURT: Right.

19 MR. WHARTON: Your Honor, we've brought this up at the
20 sufficiency hearing because, in our view, nothing in our proof
21 of claim or her responses state any sort of cognizable claim.
22 There are no facts stated in her claim supporting a claim
23 against the debtors. And as we stated in our papers, we
24 request that the Court disallow and expunge these on the
25 grounds that Ms. Carter has not met her burden of proof to

1 allege sufficient facts to support her claim.

2 THE COURT: Okay, is Ms. Carter present or on the
3 phone? No.

4 MR. WHARTON: Not that I'm aware of, Your Honor.

5 THE COURT: She did -- there was a -- I received the
6 one hand-written response to the objection from July of 2009.
7 Have you received anything else?

8 MR. WHARTON: He did file and sent to us a response
9 that we, I think, we received yesterday in response to the
10 supplemental reply we filed yesterday.

11 THE COURT: Oh, yes, I'm sorry. There's one -- I'm
12 sorry, there's one dated December 11th, as well, which I read,
13 as well.

14 MR. WHARTON: And that's on the docket as well.

15 THE COURT: Right, the thirteen-pager. It seemed to
16 me that clearly the duplicate claim should be expunged. I had
17 the following two issues on the remaining claim, or the non --
18 what is now the only claim -- in the context, again, of this
19 sufficiency hearing, which is, in essence, a motion to dismiss
20 type of burden. As I understand it, first, the claim was filed
21 late, after the bar date.

22 MR. WHARTON: That is correct.

23 THE COURT: Her December 11 response states that she
24 didn't get notice of the bar date until, basically, she got the
25 objection. I don't think I have with the -- correct me if I'm

1 wrong -- with the -- did the original omnibus objection contain
2 an affidavit by the claims agent showing that the proof of
3 claim bar date had been mailed to her address?

4 MR. WHARTON: I don't believe that the objection would
5 have stated that, but she was served with a notice of the bar
6 date.

7 THE COURT: But how do I know that? Again, this is --
8 unless it's clearly in the record, I don't know if I can rule
9 on that today.

10 MR. WHARTON: Understood.

11 THE COURT: Okay.

12 MR. WHARTON: There is an affidavit of service that
13 KCC had filed in connection with the bar date notice, and we
14 would have to --

15 THE COURT: Show me that.

16 MR. WHARTON: -- show you that.

17 THE COURT: And compare it to her address and the
18 like. So I don't think I can rule on this particular context
19 on that portion of the claim objection.

20 Secondly, as far as the other portion is concerned,
21 which is really on the merits, that the proof of claim,
22 basically, just says it's a discrimination claim, it's
23 acknowledged that there was -- and it's a reasonable inference
24 to make -- that the claim is premised upon the same facts to
25 the extent there are facts, that were dealt with in the

1 district court litigation where the Ohio district court,
2 Southern District of Ohio District Court, granted DAS, LLC's
3 motion for summary judgment. But there are two issues that I
4 have with that. One is I don't have the motion for summary
5 judgment -- I don't know -- I don't have the ruling or the
6 underlying -- I don't know what the ruling just -- I don't know
7 whether it lays out or if it just says for the reasons stated
8 in the motion it's granted. So I can't really tell, based on
9 what's before me, whether I could grant the objection based on
10 that. It's not a final order because she appealed it. An
11 appeal is pending when the case was filed and the stay hasn't
12 been lifted. So it seems to me that there's -- even though the
13 claim is sketchy, it does relate back to something that the
14 debtor actually litigated. And the debtor prevailed, but it's
15 on appeal. If I had the opinion, I might be able to rule based
16 on just looking at the opinion and saying that for the reasons
17 stated in the opinion, it's clear that there's no claim. But
18 it's not res judicata because it's on appeal.

19 So I think you should adjourn this to the next omnibus
20 date. You can supplement the record, if you wish, with either
21 or both of the affidavit of service of mailing of the bar date
22 notice and a copy of the District Court's summary judgment
23 order and anything that you also believe would be relevant,
24 such as your motion for summary judgment. Obviously, you'd
25 serve those on Ms. Carter. And then on those documents, I can

1 deal with the claim, I think. I mean, I may not rule in your
2 favor, but that would give me a basis, I think. If they show
3 the lack of merit of a claim or the fact that notice was timely
4 delivered, that the claim would either be disallowed as not
5 supported by the law and the facts or disallowed as time bar.

6 MR. WHARTON: With that information, you could address
7 the time limits --

8 THE COURT: Yeah.

9 MR. WHARTON: -- and the lack of sufficiency.

10 THE COURT: On both of them. Yeah.

11 MR. WHARTON: Okay, Your Honor, we will take that
12 approach.

13 THE COURT: Okay. And if you want to give me the
14 order on the duplicate, you can do that Monday or today.

15 MR. WHARTON: We'll do so on Monday.

16 THE COURT: Okay.

17 MR. LYONS: So just to be clear on that, Your Honor,
18 because, again, if we would submit the District Court opinion
19 as well as the affidavit of service, so it would still be in
20 connection with this sufficiency hearing?

21 THE COURT: I think so.

22 MR. LYONS: Okay, and we'll --

23 THE COURT: I don't know. I haven't read the opinion,
24 yet, so I don't know. If the District Court says that there
25 are no documents and nothing to support this, then it would be

1 a sufficiency hearing, because that's what her claim relies on,
2 is that litigation.

3 MR. LYONS: Correct.

4 THE COURT: So if that Court's already said there's
5 nothing there, then there's nothing there for me, either.

6 MR. LYONS: So --

7 THE COURT: If the Court says there is something
8 there, you'd probably have to set up a regular hearing on it.

9 MR. LYONS: Very good. And we'll give her a week
10 before the hearing is scheduled to file from the response?

11 THE COURT: That's fine.

12 MR. LYONS: I mean, we're kind of deviating from the
13 procedures so --

14 THE COURT: That's fine.

15 MR. LYONS: -- we'll give her a week --

16 THE COURT: Yeah.

17 MR. LYONS: -- after we submit it.

18 THE COURT: Yeah.

19 MR. LYONS: Okay, very good, Your Honor. The last
20 matter is the Michigan Self-Insurer Securities Funds motion for
21 leave --

22 THE COURT: Okay.

23 MR. LYONS: -- to file late claim, so I'll yield the
24 podium to Mr. Raterink.

25 THE COURT: Well, before I -- just on this last one,

1 again, I'm not limiting what you should file to just those two
2 things. I don't know what, you know, how long or how self-
3 explanatory the District Court's order will be, but you're
4 certainly free to file other pleadings such as the summary
5 judgment motion. And I would encourage you to do that if, in
6 fact, all the District Court order says is the summary judgment
7 motion is granted for the reasons set forth in the summary
8 judgment motion.

9 MR. LYONS: Um-hum. Okay, I understand. Thank you,
10 Your Honor.

11 THE COURT: Okay.

12 MR. RATERINK: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. RATERINK: Dennis Raterink appearing on behalf of
15 the Michigan Attorney General's Office, representing the
16 Michigan Self-Insurers' Security Fund. I think right off the
17 bat, as a point of clarification, earlier in this bankruptcy, I
18 had filed an appearance on behalf of the Michigan Workers'
19 Compensation Agency, back in 2005. At that time, I was
20 representing both the Workers' Compensation Agency and the
21 Michigan Funds Administration, as had been my office protocol
22 at that time. Subsequently, after a reorganization in my
23 office, those duties are split, and we have filed new
24 appearances in the case with myself representing only the
25 Michigan Funds Administration, which includes the Self-

1 Insurers' Security Fund, and a colleague of mine, Susan
2 Przekop-Shaw, representing the Michigan Workers' Compensation
3 Agency.

4 I will point out that there is no notice issue on the
5 bar date in this case. It was served -- I received a copy of
6 the bar date, and we're not claiming any issues regarding the
7 service of the bar date.

8 THE COURT: Okay.

9 MR. RATERINK: The motion we have filed is a motion to
10 permit late-file claims pursuant to Rule 9006(b) in this case,
11 as has been interpreted by the pioneer case. The two claims in
12 detail, one is a priority tax claim in the amount of over 25
13 million dollars; the other is a general unsecured claim in the
14 amount of over 36 million dollars. Both of these claims deal
15 specifically with potential liabilities that the Self-Insurers'
16 Security Fund may face for past workers' compensation claims,
17 those incurred prior to the petition date.

18 THE COURT: Can I just -- this is mostly just for
19 background edification.

20 MR. RATERINK: Yes.

21 THE COURT: When you say potential liability for past
22 claims, how do you calculate this. Is it -- do you see what's
23 in the pipeline, or how do you come up with --

24 MR. RATERINK: Yeah, when I say potential --

25 THE COURT: And I'm not asking you to be specific in

1 the numbers, but just what's the methodology?

2 MR. RATERINK: In this particular case, what we had
3 done was communicate with the third party administrator for
4 Delphi, which I don't recall the name of the administrator at
5 this point. Sedgewick James, yes. They had provided us with
6 information regarding their estimates, their reserves of the
7 values of the claims, if they would be paid out over time.
8 Those assessments are a combination of looking at the age of
9 the claimant, the amount of weekly benefits they're entitled
10 to, and the prospects of them becoming ineligible for benefits
11 before the end of their lifetime.

12 THE COURT: So it's kind of -- there's a -- a big
13 element of it is a kind of an actuarial --

14 MR. RATERINK: Correct.

15 THE COURT: -- set of assumptions?

16 MR. RATERINK: Correct. Now, our actual claim amounts
17 are not strict actuarial amounts. We put in our claims that we
18 believe that debtor may possess those type of accounts, and
19 we've requested those, but we don't -- that's not what the
20 claims are based on at this time.

21 THE COURT: Okay.

22 MR. RATERINK: Okay.

23 THE COURT: So at any one time, then, whether it's --
24 well, assume the debtors' operating.

25 MR. RATERINK: Um-hum.

1 THE COURT: And you don't have a cut-off where people
2 are -- either become employees of a new company because the
3 debtor's been sold, or because the debtor shut down, and
4 therefore, a lot of people are unemployed. So leaving that
5 aside, assume it's an ongoing business, at any one time, you
6 can make this calculation?

7 MR. RATERINK: The calculation -- we're not always
8 privy to the information that we have in this case.

9 THE COURT: Right.

10 MR. RATERINK: So in cases, it may have to be an
11 unliquidated amount that that would be filed.

12 THE COURT: Okay.

13 MR. RATERINK: That would be common in some of the
14 past cases.

15 THE COURT: But if you did have -- if you were privy
16 to the administrator of it, like here --

17 MR. RATERINK: Yes.

18 THE COURT: -- so for example, Ford or Chrysler, you
19 know, in 2000 -- well, in the summer of 2009 for Chrysler, you
20 could do it, or in 2005 or whenever, you could do it.

21 MR. RATERINK: Correct. As long as there are reserves
22 that have been calculated, those could be passed on as claim
23 amounts.

24 THE COURT: Okay.

25 MR. RATERINK: The other part of the potential -- the

1 reason I use the word potential obligations is the fact that
2 while we have listed these specific amounts in these two
3 claims, it should be noted for the record that, in fact,
4 assuming that the judge would approve our motion today, we may
5 have to amend the claims to address another situation which I
6 believe you are aware of. There is an adversary proceeding
7 that's been filed at this point by ACE American Insurance and
8 Pacific Employers' Insurance. Because there's another issue
9 pending in the Michigan Workers' Compensation Agency regarding
10 exactly who is liable for those remaining DPH/Delphi benefits.
11 If, in the end, there's a determination that ACE is, in fact,
12 liable for any or all of the claimed time periods, that would
13 reduce the amounts of the Self-Insurers' Security Fund's
14 claims, here. So there may be a portion that is contingent.

15 The Self-Insurers' Security Fund is run by a board of
16 trustees. That board of trustees has accepted liability for
17 two periods of time, two periods of time for which there is no
18 other potential payor. So these two claims also incorporate
19 those time periods, so there may need to be an amended claim.

20 THE COURT: Okay. And remind me on that, because I
21 know we had a conference on that.

22 MR. RATERINK: Yes.

23 THE COURT: What's the status of that litigation at
24 this point?

25 MR. RATERINK: In this court? Or in the Michigan

1 Workers' Compensation Agency?

2 THE COURT: Well, both.

3 MR. RATERINK: The most recent update in the Workers'
4 Compensation Agency is that the Workers' Compensation Agency
5 has scheduled a, what's termed a Rule 5 hearing for the first
6 week of January. A Rule 5 is a hearing that's reserved for
7 cases in which there's an assertion that a party is not being
8 compliant with the act. The Michigan Self-Insurers' Security
9 Fund is not a direct party to that claim. My understanding is
10 it's the director of the Workers' Compensation Agency against
11 ACE and Pacific. However, I have filed an appearance in that
12 case as an interested party.

13 In the adversary proceeding, we have a motion hearing
14 for that same week, I believe it's January 8th, for the joint
15 motion from the Michigan Workers' Compensation Agency and Fund
16 Administration to dismiss the adversary complaint, or, in the
17 alternative, hold for the Court to abstain from hearing the
18 case.

19 THE COURT: Okay, and then, as I remember, there was
20 also, I thought, going to be some potential action by a state
21 court of Michigan on not this set of issues, but a very closely
22 related set of issues that didn't involve Delphi or ACE, but
23 other -- very similar set of facts. Do you know whether that
24 ruling's come down?

25 MR. RATERINK: I'm not aware of anything pending.

1 THE COURT: Or maybe I'm not remembering it correctly.

2 MR. OLSHIN: Your Honor, I'm Lew Olshin. I represent
3 ACE and Pacific and when Your Honor feels it's appropriate, I
4 can answer some of these questions.

5 THE COURT: Well, do you know the answer to that one?

6 MR. OLSHIN: I do know the answer to that.

7 THE COURT: Okay.

8 MR. OLSHIN: There has been no ruling in that case.

9 THE COURT: All right.

10 MR. OLSHIN: It's still pending. And just to make a
11 clarification for the record, the proceeding that Mr. Raterink
12 makes reference to, our clients just received notice of three
13 or four days ago.

14 THE COURT: Okay.

15 MR. OLSHIN: And one of the things we want to discuss
16 with Your Honor when it's appropriate is we believe this is an
17 attempt to circumvent the jurisdiction of this court prior to
18 your determination on January the 8th. And we realize the time
19 of year it is. We are contemplating, perhaps, filing a Rule
20 105 motion for injunctive relief because we believe that --

21 THE COURT: Okay, but that's a separate --

22 MR. OLSHIN: It is separate, but I would like, at an
23 appropriate point to just --

24 THE COURT: Okay.

25 MR. OLSHIN: -- raise that with Your Honor --

1 THE COURT: All right.

2 MR. OLSHIN: -- and how to deal with it because it
3 relates to this interconnection that Mr. Raterink has drawn.

4 THE COURT: But the matter that I think was sub judice
5 or maybe it was going to be soon sub judice, when we last
6 talked about this with the -- on a related -- not a related,
7 but a similar issue, hasn't been ruled on, yet.

8 MR. OLSHIN: It has not been ruled on.

9 THE COURT: Okay, all right.

10 You can go ahead.

11 MR. RATERINK: Okay, thank you, Your Honor. I will
12 ask, did you retain the copy of the reply that was sent?

13 THE COURT: Yes.

14 MR. RATERINK: You did, okay. I just wanted to make
15 sure of that. In short, Your Honor, I think, looking at the
16 Pioneer factors, while we recognize that the Second Circuit and
17 the courts take a hard-line stance in terms of motions of this
18 type, we feel that the facts and the totality of the
19 circumstances in this case do justify the relief sought. If we
20 look specifically at the first factor of what the courts have
21 determined to be the most important factor, the reason for the
22 delay, the reason for the delay in this case was an erroneous
23 determination made prior to the bar date regarding whether the
24 Self-Insurers' Security Fund had a claim or could have a claim
25 at that time. Under the Michigan Workers' Compensation Act,

1 the Self-Insurers' Security Fund does not become subrogated to
2 the employees' claims until they have actually paid out on
3 those claims. So if you will, there's almost -- there's the
4 contingency that the employee doesn't get paid, and then at
5 that point, we would pay, and then we would have a claim. That
6 action has been described by debtors in a couple different ways
7 as being something that was consciously chosen, a calculated
8 decision, or a wagering that the claim would prove unnecessary.
9 I think that's incorrect only to the extent that this was not a
10 situation where there was an analysis done and pros and cons
11 weighed as to whether to file the claim. It was simply a
12 miscalculation as to whether the fund even possessed any type
13 of claim at that time.

14 THE COURT: On that score, there, I mean, there have
15 been lots of bankruptcies over the years involving Michigan
16 businesses. Are you telling me that the claimants, here, never
17 filed a proof of claim in those cases for --

18 MR. RATERINK: No, I'm not. I'm not saying that at
19 all, Your Honor. What I would tell you is that the normal
20 course of action in these cases is that we would usually have a
21 case where the -- right at the outset of the bankruptcy, that
22 the payments have stopped, or before the proof of claim
23 deadline has stopped, where the self-insurance -- the authority
24 to practice as a self-insured employer has stopped prior to the
25 bar date, or that we have full security to cover the losses

1 that are intended. In this case, in Delphi, there was no
2 security that was possessed that would help defer those costs.
3 The debtor was allowed to continue to be self-insured
4 throughout the pendency of the bankruptcy, and there was no
5 stoppage of payment until the very late -- very recently, in
6 regards to that.

7 So while I can't say that a contingent claim had never
8 been filed, myself had never done that on behalf of this
9 particular client under this particular statute. I realize now
10 that that was a miscalculation, looking at the law more
11 recently and deeper, that it should have been done at that
12 point. But that's why we're arguing that it was -- that this
13 was done due to excusable neglect.

14 THE COURT: A related point that the debtors or that
15 DPH makes, is that the -- you can look at the timing of the
16 filing of the claim, not only in terms of the length from the
17 date of the bar date to the date it was filed, but also the
18 fact that it was filed only basically on the eve of the
19 confirmation hearing for the modified plan. So therefore,
20 people had negotiated and in essence -- not the confirmation
21 hearing, the objection date for the modified plan -- that
22 people had negotiated the deal and dealt with the modified plan
23 without expecting this claim to be out there, particularly the
24 priority one, because cash was very important, obviously.

25 MR. RATERINK: I understand, Your Honor. I guess I

1 would respond to it as number one, to say that as we've stated
2 in the briefs, that the first indication that my client had
3 that the benefits were not going to be paid in an ongoing
4 manner was in the June -- early June notification that there
5 was a change in the previously filed plans. And at that point,
6 the emphasis had been in attempting to get -- work out some
7 type of arrangement where those benefits would be picked up by
8 some entity, whether it would Delphi or General Motors as it
9 may be, or one of the new buyers. It was also spent
10 accumulating that information that we included in the claims
11 file.

12 Should it have been filed quicker, in retrospect?
13 Yes, we should have filed it.

14 THE COURT: But wasn't it common knowledge that Delphi
15 was in a real perilous state?

16 MR. RATERINK: Oh --

17 THE COURT: I mean, including real concerns about
18 being able to pay its administrative expenses and might have to
19 liquidate? I mean they were even --

20 MR. RATERINK: Post-June or prior to June?

21 THE COURT: No, no. For several months before June.
22 I mean, there was as motion, for example, to -- there was
23 considerable litigation in the spring over whether the DIP
24 agreement, which expired at the end of the year, could be --
25 there could be forbearance on it. And there was a set of -- I

1 forget how many they got up to -- it was like eighteen or
2 nineteen extensions, usually on sort of a one-week, two-week
3 basis thereafter of forbearance. I mean, so -- of course, I
4 was presiding over the case, so I was seeing it firsthand, but
5 it seemed to me that that was sort of general knowledge out
6 there in the world.

7 MR. RATERINK: All I can say, Your Honor, in response
8 is, pursuant to the matters, conversations, the communication
9 received from debtors, specifically in regards to the workers'
10 comp obligations, was that there was no indication that there
11 was going to be anything other than a full adoption of the
12 obligations and a continuation of the self-insurance programs.

13 THE COURT: Okay.

14 MR. RATERINK: Okay. I would make another
15 distinction, Your Honor, which I did raise in my reply brief,
16 and you pointed out as well. When you're talking about the
17 lateness of the filing, you talk about -- you're talking about
18 prejudice, I believe, at that point. And you pointed out
19 especially as it pertains to the priority claim. And, Your
20 Honor, we would just argue that if in fact Your Honor would
21 find that the priority claim -- the excise tax claim is too
22 prejudicial to debtors in this case, that we would ask that
23 that claim be converted to a general unsecured claim.

24 And in regards to the prejudice issue, debtors really
25 don't raise an issue to the general unsecured claim, other than

1 the idea that this may lead to open up the floodgates. And
2 that argument, I think, that because of the unique
3 circumstances involved with the Michigan Self-Insurers'
4 Security Fund, the risk of opening up the floodgates, having
5 other similarly situated claimants, is very low and highly
6 speculative.

7 So with no other prejudice listed, other prejudice
8 that may be discussed is there may be prejudice to the other
9 creditors in the general unsecured class, but that doesn't --
10 is not something that the Pioneer case discusses. It discusses
11 prejudice to the debtor. So we would argue, Your Honor, that
12 if, in fact, that the Court would find that there was an
13 untenable amount of prejudice to the debtor with a priority
14 claim, that that be converted then to a general unsecured
15 claim.

16 THE COURT: Well, I have one question on that. But
17 before I forget, I just want to make -- you referred to your
18 reply a couple times.

19 MR. RATERINK: Yes.

20 THE COURT: Were there exhibits to that, because I did
21 not see exhibits?

22 MR. RATERINK: There was one exhibit, Your Honor.

23 THE COURT: All right.

24 MR. RATERINK: It was a one-page document of filing
25 that Delphi had made with the Self-Insurers' Security Fund. I

1 have a copy of it here if you'd like.

2 THE COURT: Could I see that?

3 (Pause)

4 MR. RATERINK: This exhibit just went to the notion
5 that Delphi was unawares, or the parties that were negotiating
6 were unawares of the obligations, and the other parties may
7 have a claim in that regard. Delphi itself, obviously, was
8 aware of its own Workers' Compensation obligations and
9 routinely was asked to submit its loss numbers to the Self-
10 Insurers' Security Fund, and had more awareness of what their
11 obligations were than we did. So I think it may be
12 disingenuous if they're to claim the lack of notice as to the
13 amount of the claims.

14 THE COURT: Okay.

15 MR. RATERINK: As to the other factors, Your Honor,
16 the length of the --

17 THE COURT: I'm sorry. On the prejudice point --

18 MR. RATERINK: Sure, yes.

19 THE COURT: -- the unsecured creditors aren't getting
20 very much in this case, unfortunately. Is part of your concern
21 on this a belief that somehow the allowance of this claim
22 affects the liability versus ACE?

23 MR. RATERINK: No, I don't think so, Your Honor,
24 because --

25 THE COURT: Because, I wouldn't think so either,

1 but --

2 MR. RATERINK: -- it goes back to the contingent
3 nature of the claim.

4 THE COURT: All right.

5 MR. RATERINK: I think that the ACE v. Self-Insurers'
6 Security Fund and General Motors et al. has to be resolved.

7 THE COURT: It's a separate issue?

8 MR. RATERINK: Correct.

9 THE COURT: All right. Okay.

10 MR. RATERINK: The other two factors stated by the
11 Pioneer Court, the length of the delay. We cannot deny that
12 the length, beyond the proof of claim deadline to the time that
13 the claim was filed was extremely long, three years. But
14 again, if it's taken in the context of the reasons why the
15 claim was not filed, when we became aware of the situation that
16 Delphi was, in fact, terminating its obligations to its
17 Workers' Compensation claimants, it was less than sixty days by
18 the time the claim was actually filed. And lastly, the good-
19 faith standard. I believe debtor is not contesting that
20 portion of the claim.

21 All in all, Your Honor, based on the type of benefits
22 that we're talking about here, trying to protect the ongoing
23 Workers' Compensation benefits of Delphi's injured workers,
24 taking into account the reason for the delay and the lack of
25 prejudice, we would ask that the claims be allowed to be filed

1 lately.

2 THE COURT: Okay. Let me just think. I think I've
3 asked you the questions I want to ask. But let me just --
4 well, as far as the priority tax claim, there's been no
5 refinement of that number? It still is in the roughly the
6 twenty-five million range?

7 MR. RATERINK: That's what -- yes, we've not amended
8 that claim since it was first filed. Again, I think if the
9 claims are allowed to proceed at this point, there will be an
10 amended filing to reflect the dual nature of it; number one to
11 sort out the liability that the Self-Insurers' Security Fund
12 has already accepted versus those that are contingent going
13 forward.

14 THE COURT: Right.

15 MR. RATERINK: The excise tax claim is based on Second
16 Circuit law that holds that Workers' Compensation claims three
17 years prior to the petition date are elevated to the status of
18 excise tax. So that period of time, from roughly October of
19 '02 to October of '05, does incorporate both SISF liability and
20 potentially others' as well.

21 THE COURT: So, but the remaining contingent amount,
22 which is the bulk of the claim, I guess, at this point, right?

23 MR. RATERINK: The separate claim, you mean?

24 THE COURT: Yes.

25 MR. RATERINK: The thirty-six million dollar claim?

1 THE COURT: Yes. Why wouldn't tho -- those are
2 contribution or indemnity claims, right?

3 MR. RATERINK: Those are the same type of claims as is
4 the excise tax claim. Those are based, again, on reserves
5 that --

6 THE COURT: But why wouldn't --

7 MR. RATERINK: -- have been placed on --

8 THE COURT: -- that be disallowable under 502(e) as
9 contingent on liquidated claim for contribution or indemnity?

10 MR. RATERINK: They're in the process -- these cases
11 are either in the process of being liquidated at this point --

12 THE COURT: I know, but they have -- it's --

13 MR. RATERINK: I guess, Your Honor, I would ask the
14 ability to brief that issue in a separate matter. I don't
15 think this has been raised for this particular hearing.

16 THE COURT: Well, I think that's true. And 502(e) is
17 subject to 502(j), which is reconsideration for cause. But the
18 purpose of it is so that debtors don't have to keep reserves
19 and they can make distributions if the time comes to make
20 distributions.

21 MR. RATERINK: And to answer that question, to the
22 extent -- some of these claims have been liquidated. Some of
23 these are cases that have already been adjudicated in the
24 agency, and there can be a further refinement.

25 THE COURT: Well, that would be a different issue, I

1 mean, if it's fixed. I understand that. So the priority tax
2 claim is under what section of the Code, then? It's under --

3 MR. RATERINK: Your Honor, I don't think I have that
4 in front of me at the moment, sorry. I can tell you in general
5 that it is based on at least case law and the Second Circuit's
6 interpretation that that -- those Workers' Compensation claims,
7 within the three years prior to the filing of the petition date
8 can be elevated to the excise tax status.

9 THE COURT: But I guess that's -- that was my question
10 on how this is calculated. I mean, the petition date was 2005.

11 MR. RATERINK: Correct.

12 THE COURT: And --

13 MR. RATERINK: So that time period --

14 THE COURT: -- I don't understand why people haven't
15 made their claims by now for those amounts.

16 MR. RATERINK: A lot -- well, it goes to the nature of
17 the system, I think, Your Honor. And let me see if this
18 answers your question. The time period in question runs from
19 '02 to '05. So the claims, under Michigan statute, it's if you
20 were injured during those periods of time, obviously.

21 THE COURT: Right.

22 MR. RATERINK: If you were injured in those periods of
23 time, you may already be receiving benefits, you may have a
24 case that's pending, or you may have a case that's already been
25 adjudicated. There's no statute of limitations in the State of

1 Michigan for Workers' Compensation claims. Claims can be filed
2 at any point. So you can have a new claim filed in 2009
3 relating back to that time period. There definitely -- I would
4 estimate at this point, and make the representation to the
5 Court, that there's a large amount of those -- the claims
6 within that time period are unliquidated.

7 And even when there is an adjudication by the Court,
8 it doesn't necessarily liquidate it in terms of the overall
9 value of the case. It still would leave a reserving or an
10 estimation process as to what the value of that case is going
11 to be over time. But if the workers' comp agency has made a
12 determination that the individual is eligible for benefits, it
13 would still be then -- all we would know is what they're
14 entitled to on a weekly basis. There would still have to be an
15 estimation process to say what that person -- the value of that
16 claim over time would be.

17 THE COURT: So they could be paid out on such a claim
18 over --

19 MR. RATERINK: Their lifetime.

20 THE COURT: -- decades?

21 MR. RATERINK: Yes. So the reserve process isn't only
22 for preliquidated claims or preadjudicated claims. There's
23 also a reserve process for those that have never been
24 challenged or those that have been through the court process.

25 THE COURT: All right. I have to say, given the size

1 of the claims here and the extended tail, if you will, for the
2 claim, it's a little surprising that a proof of claim wasn't
3 filed.

4 MR. RATERINK: Understood. Trust me, our internal
5 policies have changed as a direct reflection of what has
6 occurred in this case.

7 THE COURT: Well, I guess that's -- there is no
8 internal -- I mean there was no written policy, right? There
9 was no -- it was sort of -- it was more ad hoc?

10 MR. RATERINK: Correct. Case-by-case basis.

11 THE COURT: Okay. And as far as you know, claims may
12 have been or have been filed in other cases?

13 MR. RATERINK: Claims -- I'm not sure of the question.

14 THE COURT: Claims like this or -- not this size or
15 specifically like this -- but claims based on the same theory
16 have been filed in other bankruptcy cases?

17 MR. RATERINK: We have filed general unsecured claims
18 in other cases, for sure. I have never participated in the
19 Second Circuit before. And my understanding is that particular
20 elevation to excise tax status is something that's not
21 available in most jurisdictions, but is in the Second Circuit.
22 So I can't say for sure that the Self-Insurers' Security Fund
23 has filed this type of specific claim before.

24 THE COURT: Okay. All right.

25 MR. RATERINK: Thank you.

1 THE COURT: Thanks.

2 MR. LYONS: And, Your Honor, just to answer the one
3 point, I believe it's 507(a)(8) --

4 THE COURT: Okay.

5 MR. LYONS: -- that is the excise tax.

6 THE COURT: That's one that goes back three years?

7 MR. LYONS: Exactly.

8 THE COURT: Yes.

9 MR. LYONS: And the Southern District of New York,
10 they hold that you look at the date of injury to determine when
11 it occurs, within the three-year window, or outside of it, or
12 postpetition.

13 Your Honor, I think this is -- it's a very
14 straightforward legal analysis here. The bar date notice was
15 clear and unambiguous. Contingent claims were required to be
16 filed. And that -- I know Your Honor has ruled several times.
17 You've been affirmed in applying that. It is the Second
18 Circuit under Midland Cogeneration, as very strongly adhered --
19 adheres to that rule that if there is a clear dictate in a
20 rule, especially when counsel gets it, that it's going to be
21 very difficult for that party to ever get past the excusable
22 neglect requirements under Pioneer as interpreted by the Second
23 Circuit.

24 Again, you look at the control of the movant. I mean,
25 the bar date was July of 2006. The disclosure statement, where

1 they first argued that well, they thought that workers' comp
2 claims were going to be paid, which was the debtors' intent, I
3 mean, that wasn't filed until a year and a half after the bar
4 date.

5 Looking at the prejudice, no doubt, as Your Honor has
6 seen in the Plymouth Rubber case, a twenty-five million dollar
7 priority claim is severely prejudicial to DPH. And frankly, to
8 just let in -- and frankly, just letting in an unsecured claim
9 as well is prejudicial to this estate. Parties negotiated the
10 economics of the plan modification based upon a number of
11 things, including what the amount of the unsecured pool was.
12 So to let in unsecured claims, in derogation of the bar date
13 order, again, would be prejudicial to the debtors.

14 And also one other point. Proofs of claim were
15 actually filed July 29th, which was the first day of the plan
16 modification hearing. So again, the proof of claim wasn't even
17 filed in advance of the plan modification hearing, it was filed
18 at the plan modification hearing. So for all the reasons, Your
19 Honor ,we believe that when you apply Midland Cogeneration,
20 other Second Circuit law, and other orders Your Honor has ruled
21 on in this case, we believe that this motion should be denied.

22 THE COURT: Did the debtors get claims from workers
23 themselves for workers' comp, proofs of claim?

24 MR. LYONS: Yes, we did. And if Your Honor may
25 recall, they were subject to an omnibus objection. Our view

1 was, when amounts were paid out, postpetition, these Workers'
2 Compensation claimants, that cash would be applied first to the
3 priority portion of the claim. So actually, we have, for
4 Workers' Compensation claimants who did file proofs of claims,
5 I believe we have -- and I can look at Mr. Unru (ph.), but I
6 believe we have liquidated some of those claims on a general
7 unsecured basis for those claimants who had filed claims.

8 And again, similarly, other states have filed Workers'
9 Compensation claims, and we are working with those states to
10 liquidate the amounts of their reimbursement claims for
11 Workers' Compensation, including: New Jersey, Ohio, Alabama.

12 THE COURT: Okay. Okay.

13 MR. LYONS: Thank you.

14 THE COURT: Anything else?

15 MR. RATERINK: One -- just briefly, Your Honor. In
16 response, as it relates specifically to the general unsecured
17 claim. The idea of prejudice, I guess, is raised as to the
18 debtors. However, the debtor has a confirmed plan. The debtor
19 has a confirmed plan. There was a set amount in terms of
20 unsecured claims. It's going to dilute that pool, no question.
21 But that prejudice would go to the other creditors not to the
22 debtors in this case. And we think that those claims, at a
23 minimum, should be allowed. And again, if Your Honor finds
24 that the priority claim is too prejudicial, we would ask that
25 that be converted as well.

1 THE COURT: But I guess on that point, I know that
2 there are cases that talk about prejudicing the debtor, having
3 the debtor deal with a whole host of claims like this. But I
4 had always thought that the prejudice was sort of to the case
5 in general. And one of the factors was the parties'
6 negotiations. I didn't think that --

7 MR. RATERINK: I think --

8 THE COURT: -- it's --

9 MR. RATERINK: -- I did cite a case in my reply brief,
10 Your Honor, that it goes to that issue specifically. And it's
11 an interpretation. Pioneer doesn't talk about prejudice -- it
12 only talks about prejudice to the debtors in the wording of
13 Pioneer.

14 THE COURT: Okay. All right.

15 MR. RATERINK: I'd be happy to brief that more, Your
16 Honor, if you'd like.

17 THE COURT: No, that's okay. I think that that's
18 fine.

19 MR. RATERINK: Okay. Thank you.

20 THE COURT: Okay. All right. I have before me a
21 motion by the Michigan Self-Insurers' Security Fund or the
22 Fund, for leave to file a late proof of claim under Bankruptcy
23 Rule 9006(b). It filed a claim on July 29, 2009. The claim is
24 in two parts. It asserts a priority tax claim under Section
25 507(a)(8) in the current amount of \$25,460,432.50. It also

1 asserts a general unsecured claim for 36,293 dollars --
2 36,293,480 dollars. Both claims are premised upon the Fund's
3 statutory obligation to pay unsatisfied Workers' Compensation
4 claims.

5 Here, the debtors, the Delphi debtors, established a
6 bar date for filing claims of July 31, 2006. Therefore the
7 claim was filed almost three years late after the bar date.
8 The Fund asserts that the claim still should be permitted to be
9 filed based upon its asserted excusable neglect under Rule
10 9006(b)(1). And primarily it bases that assertion, at least as
11 far as its neglect is concerned and the excuse for it, on the
12 assertion that it believed that it did not have to file a proof
13 of claim, given that first, in the very early stages of this
14 case, the debtors were authorized by the Court to pay certain
15 wages and other amounts owing to employees, including Workers'
16 Compensation, which the debtors, by and large did, starting
17 with the commencement of the case; and second, that the
18 original plan filed in this case and the disclosure statement,
19 therefore, provided that Workers' Compensation claims would
20 flow through the case and would be dealt with in the ordinary
21 course, as if the bankruptcy case hadn't happened.

22 The Fund contends that shortly after learning that
23 Delphi's plan would be modified, in light of Delphi's and the
24 automotive industry's changed circumstances, to include a
25 provision that would -- to delete, among other changes, the

1 flow-through provision, it did file its proof of claim in a
2 timely basis, roughly a month after learning of that fact.

3 Delphi, now known as DPH Holdings Corp. after the
4 confirmation and consummation of its modified Chapter 11 plan,
5 has objected to the request, stating that the Fund has not
6 satisfied its burden of showing excusable neglect. In doing
7 so, it points out several facts that are relevant to the
8 Court's determination. First, and this is not disputed, the
9 Fund did get timely notice of the bar date. Second, it's clear
10 from reviewing the bar date notice as well as the bar date
11 order that the notice and order clearly covered contingent
12 claims of the kind asserted in the Fund's proof of claim.
13 Third, DPH Holdings points out that the so-called human capital
14 obligations order entered by the Court at the commencement of
15 the Chapter 11 cases in 2005, authorized the debtor to pay
16 prepetition wages and benefits, including continuation of
17 payment of Workers' Compensation claims, whether pre- or
18 postpetition. The order did not direct the debtors to do so.
19 Therefore there was always a risk that based upon changed
20 circumstances, and the debtors' exercise of its business
21 judgment, the debtors would not make such payments.

22 Moreover, there was no exception, either in that order
23 or in any other order, from the requirements of the bar date
24 order or the -- and any exceptions to that order were set forth
25 in the bar date notice, which clearly did not include an

1 exception for this type of claim.

2 In addition, the debtors point out that the plan and
3 disclosure statement upon which the Fund relied were not filed
4 until approximately a year and a half after the bar date. In
5 addition to that, the disclosure statement for that plan set
6 forth a number of risk factors describing potential
7 contingencies or conditions under which the plan would not
8 proceed to confirmation or consummation, including among other
9 things, the potential that the transaction with third-party
10 investors upon which the plan was premised, would not close.

11 It turned out, as was very widely reported, that in
12 fact, the transaction upon which the plan was premised did not
13 close. And there was a period preceding the filing of the
14 Fund's proof of claim of approximately a year, in which there
15 was substantial doubt as to the Delphi debtors' future,
16 including the prospect of the debtors' debtor-in-possession
17 financing maturing by its terms and not being renewed, and
18 ultimately the prospect of the debtors' potential liquidation.

19 Ultimately, with among other things, the assistance of
20 the United States government to the debtors' primary creditor,
21 GM, the debtor was able to propose a modified Chapter 11 plan
22 which has since been, as I said, confirmed and consummated,
23 that involved a complex set of agreements, pursuant to which
24 GM, a group of the debtors' debtor-in-possession lenders, would
25 take respective assets of the debtors; and the debtors'

1 remaining assets would be left with DPH Holdings Corporation.

2 Part of the negotiations relating to that plan which
3 proceeded from significant court-sanctioned mediation before
4 Bankruptcy Judge Morris, involved a compromise with the
5 unsecured creditors' committee which, notwithstanding the
6 assertion by the DIP lenders that the debtors were
7 administratively insolvent, negotiated successfully a
8 relatively modest recovery for unsecured creditors under the
9 modified plan.

10 The claim of the Fund was filed at the start of the
11 hearing on confirmation of the modified plan. It clearly
12 raised an issue at that time that needed to be dealt with in
13 the context of the confirmation hearing, because of, in
14 particular, the priority portion of the claim, which would have
15 seriously jeopardized the prospect of the plan being declared
16 feasible, given the cash impact of such a claim. And at the
17 time, I determined that the claim being over three years late,
18 would not, in all likelihood, have such an impact, because it
19 would be disallowed. However, I did not, at the time, disallow
20 the claim, because that was not before me. The only issue
21 being before me being whether the plan would be feasible for
22 purposes of Section 1129 of the Bankruptcy Code.

23 The Fund, at this point, is also pursuing rights
24 against the debtors' insurers, ACE and Pacific, asserting that
25 they had agreed to cover any shortfall in the debtors' payment

1 of these claims. That litigation is proceeding in this Court
2 and may also be proceeding elsewhere in Michigan.

3 The debtors contend that nothing has changed -- or DPH
4 contends that nothing has changed with regard to its cash
5 position, and that if allowed in the amount asserted, the
6 Fund's priority claim would far exceed the aggregate amount of
7 priority tax claims estimated to be paid pursuant to the
8 modified plan.

9 Based upon all of the foregoing, the debtors or DPH
10 contends that, first, the late filing of the claim is not truly
11 termed neglectful, and in addition, would not be excusable
12 under the case law interpreting Bankruptcy Rule 9006(b). That
13 rule permits a claimant to file a late proof of claim, if the
14 failure to file it was due to "excusable neglect". The burden
15 of proving excusable neglect is on the claimant seeking to
16 extend the bar date, In re R.H. Macy & Co., 161 B.R. 355, 360
17 (Bankr. S.D.N.Y. 1993).

18 The Supreme Court has developed a two-step test for
19 determining whether a late filing was due to excusable neglect
20 in Pioneer Investment Services Company v. Brunswick Associates
21 Limited Partnership, 507 U.S. 380 (1993). First, the movant
22 must show that its failure to file the claim timely constituted
23 neglect as opposed to willfulness or a knowing omission.
24 Neglect generally being attributed to a movant's inadvertence,
25 mistake, or carelessness (ibid., 387-88).

1 After establishing neglect, as opposed to willfulness
2 or knowledge of the bar date and a failure to show any
3 unknowing basis for neglecting it, the movant must show, by a
4 preponderance of the evidence, that the neglect was excusable.
5 That analysis is to be undertaken on a case-by-case basis,
6 based on the particular facts; although the Court is to be
7 guided by and make the determination by balancing the following
8 factors: the danger of prejudice to the debtor; the length of
9 the delay, and whether or not it would impact the case; the
10 reason for the delay, in particular whether the delay was in
11 the control of the movant; and whether the movant acted in good
12 faith (ibid., 395).

13 However, it's recognized in the Second Circuit, based
14 upon the Second Circuit's analysis of Pioneer that,
15 "Inadvertence, ignorance of the rules or mistakes construing
16 the rules, do not usually constitute excusable neglect."
17 Midland Cogeneration Venture LP v. Enron Corporation, In re
18 Enron Corporation 419 F.3d. 115, 126 (2nd Cir. 2005), citing
19 Pioneer 507 U.S. 392.

20 In Midland Cogeneration the Second Circuit further
21 stated, "We have taken a hard line in applying the Pioneer
22 test," Silivanch v. Celebrity Cruises Inc., 333 F.3d. 355, 368
23 (2nd Cir. 2003). "In a typical case, three of the Pioneer
24 factors: the length of the delay, the danger of prejudice, and
25 the movant's good faith, usually weigh in favor of the party

1 seeking the extension (ibid., 366). We noted, though, that we
2 and other circuits have focused on the third factor, the reason
3 for the delay, including whether it was within the reasonable
4 control of the movant (ibid. to quoting Pioneer, 507 U.S. 395)
5 and we cautioned that the equities will rarely if ever favor a
6 party who fails to follow the clear dictates of a court rule,
7 and that where the rule is entirely clear we continue to expect
8 that a party claiming excusable neglect will, in the ordinary
9 course, lose under the Pioneer test (ibid., 366-367)." Again,
10 that's all the quote from Midland at 419 F.3d 122-23.

11 See also In re Musicland Holding Corporation, 2006
12 Bankr. LEXIS 3315 at pages 10-11 (Bankr. S.D.N.Y. 2006),
13 emphasizing and noting that the Second Circuit emphasizes the
14 reason for the delay in determining excusable neglect and
15 stating that, "The other factors are relevant only in close
16 cases."

17 The reasons behind the Second Circuit's hard line
18 under 9006 and with regard to excusable neglect, should be
19 noted as applied in particular in the bankruptcy context to
20 requests to extend the claims bar date. "The bar date serves
21 the important purpose of enabling the parties-in-interest to
22 ascertain with reasonable promptness the identity of those
23 making claims against the estate and the general amount of the
24 claims, a necessary step in achieving the goal of successful
25 reorganization," In re Calpine Corporation 2007 U.S. Distr.

1 LEXIS 86514 at pages 14-15 (S.D.N.Y. November 21, 2007), citing
2 In re Best Products Company Inc., 140 B.R. 533, 357 (Bankr.
3 S.D.N.Y. 1992). See also In re Asia Global Crossing Ltd., 324
4 B.R. 503, 508 (S.D.N.Y. 2004).

5 Part of the logic behind the importance of the bar
6 date is to recognize that bankruptcy cases are multiparty
7 cases, where the other parties-in-interest, who don't have
8 access to the debtors' books and records, at least have access
9 to the claims that have been filed timely and can therefore do
10 their calculations for purposes of their analysis of potential
11 recoveries in the case and their negotiations, based upon the
12 timely filed claims. See In re Drexel Burnham Lambert Group
13 Inc. 148 B.R. 1002, 1008-10 (Bankr. S.D.N.Y. 1993).

14 Allowing late filed claims, especially after a
15 debtor's plan is confirmed, subjects the debtor to prejudice,
16 because it would have to renegotiate settlements reached in
17 contemplation of the known claims against the estate (ibid.).
18 And also it's the case that allowing a late claim after a plan
19 has been confirmed, materially alters the distribution to
20 creditors that would prejudice the creditors who relied on the
21 disclosed distributions when voting to accept or reject the
22 plan (ibid.). I believe that that consideration, while not
23 necessarily applying to factor number one stated in the Pioneer
24 case, which is the prejudice to the debtor, since the plan has
25 already been confirmed, would relate to factor number two,

1 which is not only the length of the delay, but whether or not
2 it would impact the case. Clearly it would not seem fair if
3 parties negotiated a particular resolution in reliance on one
4 set of claims, only then to be asked to live with a diluted
5 distribution based upon a late claim.

6 Here the rationale for not filing the claim on a
7 timely basis ultimately comes down to a mistake, I believe, of
8 law, as opposed to the claimant either being reasonably
9 confused by the facts or other actions taken by the debtor. As
10 I noted, the bar date as well as the Bankruptcy Code itself,
11 are clear that contingent unliquidated claims are claims that
12 are dealt with in a bankruptcy case, and may be, and in this
13 case were, subject to the bar date; thus putting the onus on
14 the claimant to file a timely proof of claim, even if the claim
15 is contingent and unliquidated.

16 Here, based on the colloquy at oral argument, at least
17 a substantial portion of these claims, even today, are
18 contingent and unliquidated. However, since they go back at
19 least three years for the priority claim, and perhaps more for
20 the unsecured claim -- indeed more for the unsecured claim,
21 there was, it appears to me, at least some portion of these
22 relatively large claims that were not contingent and
23 unliquidated, at least not unliquidated as far as the original
24 holder was concerned, the Delphi employee. Therefore, it would
25 seem to me, given the time when these claims would be said to

1 arise, which again, could go back several years before the
2 petition date, that it would be normal to file a proof of claim
3 on behalf of the Fund, having received the bar date.

4 The Fund cannot tell me that it has never not filed a
5 claim in these circumstances. And the implication I took away
6 from counsel's candid remarks, is that the Fund has filed
7 claims for -- at least on an unsecured basis, not on a priority
8 basis -- in bankruptcy cases for these types of purposes.

9 Clearly, the debtor did not mislead the Fund in that
10 no order directed the debtor to pay these amounts. And in
11 addition, the plan upon which the Fund says it relies, was not
12 filed until well over a year after the bar date passed. In
13 addition, as I said, the plan itself had a number of risk
14 factors in it. And finally, that plan itself, went by the
15 boards, again, well over a year before the claim was filed.

16 So it appears to me that there is an issue here as
17 to -- a serious question here as to whether the claim's late
18 filing was within the reasonable control of the claimant. I
19 believe it was, given the claimant's proffered excuses here
20 being ultimately excuses of a legal nature, where the law and
21 the bar date and the claim notice are clear in laying out the
22 legal requirement to file the proof of claim. In addition,
23 although again, in the Second Circuit the foregoing analysis is
24 the primary analysis to be undertaken, the other factors do not
25 particularly help the claimant here.

1 The length of the delay is obviously quite
2 significant. Not only the three years short a couple of days
3 between the bar date and the filing of the claim; but also the
4 fact that the claim was filed well after the risk of Delphi not
5 paying unsecured creditors, including Workers' Compensation
6 claimants, having to shut down substantial parts of its
7 business and potentially having to liquidate, all were, I
8 believe, a matter of common knowledge.

9 Secondly, the fact that the claim was filed after the
10 proposal of the modified plan that had been negotiated with the
11 DIP lenders, GM, and the creditors' committee, and indeed on
12 the eve of the confirmation hearing for that plan, meant that
13 those very sensitive negotiations which had proceeded for
14 months, were at that point, or would be at that point, have
15 been significantly jeopardized by the filing of the late claim.

16 That is most clear for the priority claim, which would
17 impose a significant tax -- a significant cash obligation on
18 the cash-strapped estate, but also in respect of the unsecured
19 claim, in that it would alter the calculus on behalf of the
20 unsecured creditors that had underlined the negotiation of the
21 plan by the creditors' committee, and in addition, raised the
22 specter of other similarly-situated unsecured creditors
23 asserting late claims, particularly claims for contingent and
24 unliquidated debts at the time of the bar date that had since
25 become liquidated; again, all based upon a legal

1 misconstruction of the bar date notice order and code.

2 The movant, I recognize, acted in good faith. But as
3 noted by Judge Bernstein in the Musicland Holding Corporation,
4 that factor on its own, won't outweigh the other factors that I
5 have discussed.

6 I will note, obviously, that there is clearly some
7 prejudice to the Fund here, although the Fund is actively
8 pursuing other sources, namely the insurance carriers, whose
9 litigation is also before me. So again, weighing all of these
10 factors, I conclude that the Fund has not carried its burden to
11 establish excusable neglect here in respect of its proof of
12 claim.

13 So DPH's counsel should submit an order consistent
14 with my ruling. You don't need to settle that order, but you
15 should provide a copy of it to counsel for the Fund no later
16 than when you submit it to chambers, so he can make sure that
17 it's consistent with my ruling.

18 MR. LYONS: We will, Your Honor. And we'll be
19 consistent with some of the other orders --

20 THE COURT: Okay.

21 MR. LYONS: -- on the bar date as well.

22 THE COURT: All right. Thank you.

23 MR. LYONS: Your Honor, we just have -- I'm sorry, Mr.
24 Raterink?

25 MR. RATERINK: Did you want to talk with us today,

1 Your Honor?

2 THE COURT: Well, I'll hear you briefly. I don't want
3 to get too much into it, because really have -- you can tell
4 from my questions, I was only generally familiar with our prior
5 discussions.

6 But, Mr. Lyons, before we do that, do you have
7 anything else on this?

8 MR. LYONS: Well, I do have on -- the practice we have
9 engaged with the Court in submitting stipulations, we typically
10 would serve them out on other parties on a seven-day notice.
11 Under the plan, there is no need for, we believe -- any need
12 for further notice to parties. I mean, again, we still may
13 want to have the Court enter them to just coincide with the
14 claims register.

15 THE COURT: Well, I amended the case management order
16 to take out various parties who were on the notice list. I
17 don't know if you've -- that was submitted by Ms. Marafioti. I
18 don't know if you've seen that or not?

19 MR. LYONS: Yes. But even this, I don't believe we
20 need to -- because again, it's a -- we can settle claims,
21 frankly, without approval of the Court.

22 THE COURT: Right.

23 MR. LYONS: We may, as a matter of cleaning up the
24 docket and to make sure that it coincides with our claims
25 register, still have the Court enter those stipulations.

1 THE COURT: Right.

2 MR. LYONS: So we would just request that -- and
3 unless Your Honor has an issue -- just dispense with the
4 noticing of these stipulations which are --

5 THE COURT: I don't think you need notice unless
6 there's something in the stipulation that clearly affects some
7 third party's rights.

8 MR. LYONS: Very good. And we'll certainly serve --

9 THE COURT: And I doubt you'll have that. But you
10 know, the type of thing where you settled at someone else's
11 expense, something like that --

12 MR. LYONS: Sure.

13 THE COURT: -- obviously you'll need to.

14 MR. LYONS: Understood. Your Honor, on this last
15 matter, again, Mr. Hogan has primarily been representing DPH
16 Holdings in the --

17 THE COURT: This is the ACE Insurance?

18 MR. LYONS: -- in the ACE matter.

19 THE COURT: Okay.

20 MR. LYONS: So, although I'm certainly happy to listen
21 and hear what everybody has to say, I guess I have to kind of
22 reserve the debtors' response --

23 THE COURT: All right.

24 MR. LYONS: -- if you need something substantive from
25 us, until we --

1 THE COURT: Well, I don't think we're going to have
2 anything substantive today. This is really just an update for
3 me.

4 MR. BUNIN: All I was going to say, Your Honor is that
5 I don't think we can have a conversation without counsel for
6 the agency being here, as they are the moving party in that
7 particular motion.

8 THE COURT: Because you, at this point there's two
9 different counsel?

10 MR. BUNIN: Complete separation.

11 THE COURT: All right.

12 MR. BUNIN: All I would say, Your Honor --

13 THE COURT: So I think, you should just give me a
14 heads-up, maybe, and that's about it.

15 MR. BUNIN: I'm not going to speak to anything on the
16 merits.

17 THE COURT: Okay.

18 MR. BUNIN: All I'm going to suggest to Your Honor, if
19 I might, is we have a motion to dismiss that was filed against
20 us that will be fully briefed as of this coming Monday. Your
21 Honor scheduled a hearing date on January the 8th. We, as I
22 said, received a few days ago, this hearing notice for
23 something which I can only say attempted to beat Your Honor's
24 hearing date by a few days.

25 And what I would propose is that perhaps we could

1 submit a letter to Your Honor, requesting some type of a
2 conference call so that we could see whether we could schedule
3 a date to hear this motion to dismiss more quickly than the
4 January 8th date. Because as Your Honor just alluded to in the
5 opinion you just read, you talked about the interplay of what's
6 taking place. And we think it's important that as this matter
7 was filed with Your Honor, that Your Honor's jurisdiction be
8 determined, as you previously indicated you would, on January
9 the 8th. And now I think we need a more expedited hearing to
10 avoid some situation where the parties need to engage in
11 collateral litigation.

12 THE COURT: Well, you know, I don't really want to get
13 into sort of -- you're certainly free to make whatever request
14 you want to make. I think it would be unlikely that I would
15 backdate the hearing to get a leap on the state court -- it's
16 not a state court, it's a --

17 MR. BUNIN: No, it's --

18 THE COURT: -- an administrative body.

19 MR. BUNIN: -- Workers' Compensation Agency who
20 appointed somebody who's not even a judge --

21 THE COURT: Well --

22 MR. BUNIN: -- to hear something to determine a
23 coverage case.

24 THE COURT: -- well, it seems to me that you all
25 should be talking to that person and pointing out to that

1 person that there's something before me that's been brought by
2 the plaintiff in that case. I'm reluctant -- I don't think
3 it's seemly for me to move the -- I mean, you could convince me
4 otherwise, but it just -- it doesn't seem seemly for me to be
5 jumping ahead of someone.

6 MR. BUNIN: Well, I would say --

7 THE COURT: On the other hand, you have a right to
8 seek an injunction. You have a right to try to persuade me
9 otherwise. My general experience is that the state courts and
10 administrative agencies, just like the federal courts, like to
11 do things in an orderly way, and don't like to have forum
12 shopping. And if something was scheduled and has long been
13 scheduled, generally, if they're made aware of that, they
14 realize that their schedule switcher, usually set
15 automatically, can be reset.

16 I have no indication, for example, that the
17 administrative officer involved with this matter even knows
18 about what's before me or any timing issues, and --

19 MR. BUNIN: Well, we can make that claim, because the
20 same lawyer represents them, and it's a defendant here in the
21 adversary proceeding.

22 THE COURT: Well, no, that's the lawyers. But the
23 person presiding over it may not know that. And it would seem
24 to me, in the first instance you should focus on that
25 proceeding, which is the subsequently commenced one, and make

1 it clear that it's -- to the extent you think it is somehow
2 itself somewhat of an unseemly end run or attempt to end run
3 what's been teed up in front of me for some time now.

4 MR. BUNIN: That is my concern.

5 THE COURT: Well, generally speaking, as I said, all
6 courts, whether they be state courts or federal courts, are
7 responsive to those concerns. And rather than me sort of take
8 the bit in my teeth without the courtesy of letting the other
9 tribunal know -- having the parties tell the other tribunal
10 what's going on, I think is premature.

11 MR. BUNIN: I understand Your Honor's --

12 THE COURT: But it's not a ruling. I mean, this is
13 like an off-the-cuff request. And you're going to get my off-
14 the-cuff response. And you're certainly free, again, to ask
15 for an injunction of the parties and/or some other relief. But
16 I would -- I could tell you the first question I'd ask, which
17 is has anyone talked to the administrative officer, because --

18 MR. BUNIN: Well, we just got the hearing notice --

19 THE COURT: I know. So --

20 MR. BUNIN: -- a couple days ago.

21 THE COURT: -- I mean, that's what you ought to do
22 first. That's what I -- if I were in the other position,
23 generally speaking, the one thing that might really get me
24 crosswise is if one of the parties went, before talking to me,
25 and went to the other court and just tried to do an end run

1 around me. We're all protective of our jurisdiction first and
2 foremost, but we're equally -- when that's recognized, we're
3 all equally sensitive to races to the courthouse and forum
4 shopping. And as long as our jurisdiction's suitably
5 recognized, the latter policy generally wins out, so.

6 MR. BUNIN: Understood, Your Honor.

7 THE COURT: Okay.

8 MR. LYONS: Your Honor, one other matter, because I
9 did want to mention something. I mean, we do have the plan
10 injunction, and we actually made it very clear to the State of
11 Michigan --

12 THE COURT: Well, that's a separate issue. If there's
13 an existing stay or injunction, then people can -- again,
14 people can ask for injunctive relief on all sorts of grounds.
15 But I'm just not -- my initial reaction is negative to moving
16 up the hearing.

17 MR. LYONS: I guess my point is somewhat different,
18 Your Honor --

19 THE COURT: I know. You're saying that Michigan may
20 be proceeding at its peril.

21 MR. LYONS: Because we got a notice of hearing and we
22 respectfully said the claims are to be adjudicated through the
23 bankruptcy court under the plan. So please direct your --

24 THE COURT: Well, but they just have been, right?

25 MR. LYONS: I'm sorry?

1 THE COURT: They just have been?

2 MR. LYONS: They've been conducting -- I don't know
3 what they've been doing with notices of the hearing. Frankly
4 we just --

5 THE COURT: But we just did adjudicate the claim.

6 MR. LYONS: Yes, but some of the underlying --

7 MR. BUNIN: I think Mr. Lyon is referring to the same
8 hearing that I'm referring to.

9 MR. LYONS: -- the underlying Workers' Compensation
10 claims, Your Honor, they -- we had routine notice of hearing,
11 because that's what we received in the past.

12 THE COURT: Oh, okay.

13 MR. LYONS: But again, we made it clear that if it's a
14 claim that affects the estate and the claims, they need to do
15 it through this Court's process, and you can't make a ruling
16 that's going to change the priority of a claim --

17 THE COURT: I guess I was -- maybe -- again, because
18 this is off-the-cuff. My impression was that -- maybe I'm
19 wrong about this -- that the proceeding that was -- had just
20 been scheduled or recently scheduled, wasn't really a claim
21 adjudication proceeding, but it was trying to determine the
22 same issue that's before me, which is, is the insurer
23 responsible for this?

24 MR. BUNIN: Which that impacts on the --

25 THE COURT: If that --

1 MR. BUNIN: -- administrative claim --

2 THE COURT: -- well, I don't know --

3 MR. BUNIN: -- of ACE and Pacific.

4 THE COURT: -- I -- it's a little different than the
5 point Mr. Lyons was making. But obviously, if whatever is
6 being sought to be determined is contrary to an injunction that
7 I have previously issued, or the plan, then obviously Michigan
8 is proceeding at its peril, and that is something, if that's in
9 fact the case, that I would be amenable to issuing a further
10 injunction on. Although I don't like to issue injunctions in
11 furtherance of injunctions, since the first injunction should
12 control.

13 MR. LYONS: Understood.

14 THE COURT: Okay.

15 MR. LYONS: Your Honor, we have nothing further.

16 THE COURT: Okay.

17 MR. LYONS: Thank you.

18 (Proceedings concluded at 12:42 p.m.)

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I N D E X

RULINGS

	Page	Line
Official Committee of Eligible Employee Retirees' Motion for Relief Granted	10	10
Debtors' Claim Objection to Claims File by Jane Duffy Granted	27	13
Debtors' Claim Objection to Claims Filed by Barbara Burger, Paul Pickles, Patricia Wineman, and Hubert Noel Morgan Granted	29	3
Debtors' Objection to Proofs of Claim Filed by Johnson Controls, Inc. and Affiliates Granted	30	23
Debtors' Motion to Disallow Claims by AIG Granted	32	6
Debtors' Motion to Disallow Claims Made by RLI Granted	32	21
The Fund has not Carried its Burden to Establish Excusable Neglect in Respect of its Proof of Claim	74	10

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Dena Page

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: December 22, 2009